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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 682

WALLER C. BOEDEKER,

Petitioner,

v.

HAROLD C. ABRAMSON, Trustee
for CASCO CHEMICAL CORPORATION, Bankrupt,
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Waller C. Boedeker, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, which reversed the decision of the United States District Court for the Northern District of Texas at Dallas denying any right of recovery by respondents against petitioner.

REFERENCE TO REPORTS

The opinion of the District Court in this case was not reported in the Federal Supplement. The Findings of Fact and Conclusions of Law entered by the District Court are set forth on pages 75 to 87 of Volume I of the Transcript of Record filed herewith. The Judgment of the District Court is set forth on pages 86-87 of said Transcript of Record.

The opinion of the Court of Appeals in this case is reported in 379 F. 2d 741 and also appears in 2 CCH Bankruptcy Law Reporter, ¶62,297.

JURISDICTION

(i) The original decision of the Court of Appeals in this case (No. 23127) was dated June 23, 1967.

(ii) The petition for rehearing in this case filed by Waller C. Boedeker was denied by the Court of Appeals on August 15, 1967. Waller C. Boedeker was granted a stay of the mandate to apply for and to obtain a writ of certiorari from the Supreme Court of the United States for a period of forty-five days from August 25, 1967. No bond was required.

(iii) This Court has jurisdiction to review the judgment of the Court of Appeals for the Fifth Circuit in this case by writ of certiorari under the provisions of Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The most important question presented for review in this case is the holding of the Court of Appeals for the Fifth Circuit with reference to the date of bankruptcy. Simply stated, the question is this: In an involuntary bankruptcy proceeding, can the effective date of bankruptcy antedate the commission of the act of bankruptcy upon which the petitioning creditors base their case? The Court of Appeals answered the proposition in the affirmative. Petitioner contends that such holding is logically and legally wrong and that it conflicts with the decisions in many of the circuits.

Another important question in this case relates to the priority of the government tax liens with respect to the accounts receivable of the bankrupt which were assigned to petitioner. The specific problem is whether under the provisions of Section 6321 of the Internal Revenue Code, 26 U.S.C.A. §6321, the bankrupt had any property interest in the accounts at the time the tax liens became effective.

A related problem in the case involves the question whether the garnishment lien of one of the bankrupt's creditors had priority over the earlier assignment by the bankrupt of its accounts receivable to petitioner's assignor.

Also arising in the case are certain alternative questions, as follows:

(a) Did the drafts of the bankrupt that were purchased by petitioner's assignor represent the bank-

rupt's right to payment of the accounts for which they were drawn, within the meaning of Article 260-1, Section 1, Vernon's Ann. Tex. Civ. Stats.?

(b) Was the recorded assignment of certain of the bankrupt's accounts receivable taken "in good faith," as required by Article 260-1, Section 6, Vernon's Ann. Tex. Civ. Stats., when given as security for a pre-existing obligation at a time when the bankrupt was in serious financial difficulty?

(c) In view of the fact that the bankrupt's trustee did not make any claim in the trial court under Section 70e of the Bankruptcy Act with reference to the government tax liens, can the trustee assert such a claim for the first time on appeal?

STATUTES INVOLVED

The statutes involved in this case, set forth verbatim at the end of this petition as Appendix B, are as follows:

Section 70e of the Bankruptcy Act, 11 U.S.C.A. §110(e).

Section 6321 of the Internal Revenue Code of 1954, 26 U.S.C.A. §6321.

Rule 15(c), Federal Rules of Civil Procedure.

Article 260-1, Sections 1 and 6, Vernon's Annotated Texas Civil Statutes.

STATEMENT OF THE CASE

A full statement of the facts in this case as found by the District Court is set forth at pages 75-80 of Volume I of the

Transcript of Record. The facts most pertinent to the issues are as follows:

Casco Chemical Corporation, the bankrupt, was in the business of selling oil and tallow. During 1959 it made numerous sales to Bunge Corporation. Upon making a sale to Bunge, Casco prepared an invoice directed to Bunge Corporation describing the merchandise involved in the sale, the terms, price, contract number, etc. Casco then drew a sight draft on Bunge Corporation in the same amount as shown on the invoice and the invoice would be attached to the draft. Casco then presented the draft with the invoice attached to the First National Bank in Dallas. Upon verification of the transaction the bank notified Bunge that it was purchasing the draft from Casco. Casco endorsed the draft to the bank and the bank gave Casco immediate credit in its bank accounts, which amounts were promptly withdrawn by Casco. The First National Bank in Dallas then forwarded the draft with the invoice attached to its correspondent bank in New York which presented the draft to Bunge for payment.

During August and September, 1959 Casco sold oil and tallow to Bunge in the total amount of $159,330.00, following the above procedure. Upon presentation to Bunge Corporation these drafts were dishonored.

In November, 1959 the bank instituted suit in a State District Court in Dallas County to collect from Bunge the accounts and connected drafts. Bunge transferred the action to the United States District Court for the Northern Dis-

trict of Texas, Dallas Division, and it became Civil Action No. 8353 on the docket of said court. Bunge admitted owing $74,912.20 and paid this sum into the Registry of the Court and interpleaded other claimants to the fund. Casco was served with summons in Civil Action No. 8353 on January 5, 1960. Though properly served, Casco failed to answer or otherwise appear in Civil Action No. 8353.

Petitioner Boedeker along with others had guaranteed the payment of Casco's indebtedness to the bank. Upon demand by the bank, Boedeker honored his guaranty and paid to the bank $197,807.99. He received from the bank an assignment of all its claims and causes of action against Casco and intervened in Civil Action No. 8353 as plaintiff in the place of the bank.

In Civil Action No. 8353 Excel Packing Company claimed a portion of the funds paid into court by Bunge based upon an assignment received from Casco dated November 17, 1959 and recorded under the procedure prescribed by Vernon's Ann. Civ. Tex. St. Article 260-1 on November 18, 1959. This assignment was given as security for a pre-existing obligation and was taken when Casco was in serious financial difficulty. Superintendence Company, Inc. claimed a portion of the funds based upon a writ of attachment served on Bunge on November 17, 1959.

Almost two years after Civil Action No. 8353 had begun the parties reached an agreement in settlement of that case and an agreed judgment was entered on October 5, 1961. Under this judgment, Boedeker received the sum of

$55,551.58, Excel Packing Company received the amount of $10,000.00 and Superintendence Company, Inc. the sum of $2,500.00.

Unknown to the parties in Civil Action No. 8353, on October 4, 1961 the day before the above judgment was entered, an involuntary petition in bankruptcy was filed against Casco. This petition was numbered 4959 In Bankruptcy and alleged that Casco had less than twelve creditors and that within four months preceding the filing of the petition Casco had committed an act of bankruptcy through transfers of its property within Section 67d of the Bankruptcy Act, concealed its assets, and suffered a preferential transfer under Section 60a of the Bankruptcy Act. The allegations in the petition merely recited the statutory language and no facts whatsoever were alleged to support these allegations. Although filed on October 4, 1961, the petition was sworn to by the attorney for the petitioner on the 5th day of July, 1961.

Casco filed an answer alleging that it had in excess of twelve creditors and denying it had committed any acts of bankruptcy. On February 26, 1962 the petitioning creditor filed a document entitled "First Amended Involuntary Petition," which alleged as acts of bankruptcy the transfer of the sums in the District Court in Civil Action No. 8353 to Boedeker, Excel, Superintendence and McRedmond Bros., Inc., on October 5, 1961. On February 27, 1962 two other creditors filed a plea in intervention joining the petitioning creditor. In the plea in intervention, these creditors adopted the allegations contained in the First Amended Petition in Bank-

ruptcy filed February 26, 1962 and made no mention of the original involuntary petition filed on October 4, 1961.

On April 16, 1962 Casco was adjudicated bankrupt under the Bankruptcy Act. The order of adjudication was based upon the First Amended Involuntary Petition and makes no mention of the original petition filed on October 4, 1961. Such order reads as follows:

"ORDER OF ADJUDICATION

"Hearing on the merits having been set herein for the 18th day of April, 1962, and the issues drawn by the First Amended Involuntary Petition in Bankruptcy, and the Debtor's Answer thereto, and the attorney for the bankrupt having advised this Court that the bankrupt no longer desired to contest its adjudication as a bankrupt, but instead, desires to withdraw its Answer and be adjudicated by default and agreement;

"IT IS THEREFORE ORDERED that CASCO CHEMICAL CORPORATION be, and it is hereby adjudicated a bankrupt within the meaning of the Bankruptcy Act."

The United States has made assessments against Casco for withholding, F.I.C.A., F.U.T.A. and excise taxes for various periods in 1959 and 1960. These assessments were made in 1960 and the earliest assessment was made on January 22, 1960. Notices of federal tax liens were filed with the County Clerk in Dallas County in 1960 and 1961. The earliest date any of such tax liens were recorded was April 12, 1960.

This case is a plenary proceeding brought by the bankruptcy trustee of Casco Chemical Corporation against peti-

tioner herein to recover the aforesaid sum of $55,551.58 under various provisions of the federal Bankruptcy Act. The United States of America intervened in this proceeding, asserting federal tax liens against said sum of money. See Volume I of Transcript of Record, pages 1-7 and 17-24.

ARGUMENT

I.

The Decision of the Court of Appeals in This Case With Reference to the Effective Date of Bankruptcy Is in Conflict With Numerous Decisions of Other Courts of Appeal and With Two Decisions of the Fifth Circuit Itself.

The original involuntary petition against Casco was filed on October 4, 1961. Such petition alleged no specific act of bankruptcy and merely recited statutory language in this connection. The petition was amended on February 26, 1962 to incorporate allegations of a specific act of bankruptcy. Such act occurred subsequent to October 4, 1961.

The Court of Appeals has held that the effective date of bankruptcy in this case was October 4, 1961. No other case has ever held that the date of bankruptcy could precede the date of the act of bankruptcy asserted by the petitioning creditors. The following decisions hold that an amended bankruptcy petition cannot be substituted for the original petition and relate back to the date of filing the original

petition if the amendment sets forth a new act of bankruptcy, contrary to the holding of the Court of Appeals in this case:

Second Circuit:

Matter of Ideal Mercantile Corporation, 244 F. 2d 828 (2 Cir. 1957), cert. den. 355 U.S. 856, 2 L. ed. 2d 63, 78 S. Ct. 84 (1957)

Dworsky v. Alanjay Bias Binding Corporation, 182 F. 2d 803 (2 Cir. 1950)

Glint Factors, Inc. v. Schnapp, 126 F. 2d 207 (2 Cir. 1942)

Gaynor Homes, Inc., 65 F. 2d 378 (2 Cir. 1933)

In re Condon, 209 F. 800 (2 Cir. 1913)

Third Circuit:

Stolzenbach v. Penn-American Gas Coal Co., 295 F. 628 (3 Cir. 1924)

Fifth Circuit:

Wynne v. Rochelle, ... F. 2d .... (5 Cir. 1967), CCH Bankruptcy Law Reporter ¶62, 336

In re Louisell Lumber Co., 209 F. 784 (5 Cir. 1913)

Seventh Circuit:

In re Brown Commercial Car Co., 227 F. 387 (7 Cir. 1915)

In re Silver, 109 F. Supp. 200 (D.C., E.D. Ill., 1952), affirmed 204 F. 2d 259 (7 Cir. 1953)

Eighth Circuit:

National Refining Company v. Pennsylvania Petroleum Company, 66 F. 2d 914 (8 Cir. 1933), cert. den. 291 U.S. 667, 78 L. ed. 1058, 54 S. Ct. 453 (1934)

Hovland v. Farmers' State Bank of Christine, N.D., 10 F. 2d 478 (8 Cir. 1926)

Ninth Circuit:

A. & T. R. Co. v. Interstate Oil Corporation, 63 F. 2d 674 (9 Cir. 1933)

Tenth Circuit:

Superior Manufacturing Corporation v. Hessler Manufacturing Company, 267 F. 2d 302 (10 Cir. 1959), cert. den. 361 U.S. 876, 4 L. ed. 2d 114, 80 S. Ct. 139 (1959)

The holding of the Court of Appeals in the case at bar also conflicts with the provisions of Rule 15(c) of the Federal Rules of Civil Procedure.

The problem is succinctly stated in the *Louisell* case, *supra*, 209 Fed. 784 at 787, as follows:

> "It would defeat the intention of the bankruptcy Act if creditors could file a blank or skeleton petition against their debtor, alleging no act of bankruptcy, and,

> after a lapse of more than four months, amend it by filling up the blanks, alleging acts of bankruptcy, and have the amendment relate back in its effect for a period of over eight months to a time within four months before the filing of the blank petition, and dissolve valid liens then existing on the bankrupt's property * * * If a petition alleging no act of bankruptcy may lie dormant for more than four months, and then by amendment be given retroactive vitality, cancelling liens made secure by the four months' limitation, the same effect would be given the amendment of such a petition made twelve months after it was filed, thereby annulling liens that had attached sixteen months before the amendment. We cannot approve a procedure that leads to such results. It would be destructive of rights intended to be preserved by the four months' limitation."

Further, it is common knowledge that the mere filing of an involuntary bankruptcy petition against a debtor almost invariably places his business in a state of suspended animation. All of the credit reporting agencies spread the news of the pending legal proceeding and further extension of credit to the debtor comes to an abrupt halt. The result of this action alone can and often does cause financial embarrassment, insolvency, and bankruptcy itself. The present decision of the Court of Appeals gives creditors an unlimited license to file blind petitions and then to cast around at their leisure to uncover a true act of bankruptcy, with the added assurance that the debtor will probably go bankrupt anyway due to the filing of the petition which destroys his reputation and credit. This result is not justified by the authorities relied upon by such court, is manifestly unfair and unjust, and should not be permitted.

The holding of the Court of Appeals in the case at bar is in conflict with the decisions listed above and this court should exercise its discretion to grant certiorari and thus resolve the question.

II.

With Respect to the Priority of the Government Tax Liens in This Case, the Court of Appeals Has Decided An Important Texas State Law Question in Conflict With the Applicable Law of Said State.

The Court of Appeals held that the government had tax liens superior to the rights of petitioner in the assigned accounts receivable of Casco.

Under Section 6321 of the Internal Revenue Code the government can affix a lien only on property in which the taxpayer, Casco in this instance, has an interest. *City of New York v. United States*, 283 F. 2d 829 (2 Cir. 1960); *Central Surety & Insurance Corp. v. Martin Infante Co.*, 272 F. 2d 231 (3 Cir. 1959); *United States v. Burgo*, 175 F. 2d 196 (3 Cir. 1949).

Whether or not the taxpayer has any interest in property on which levy is sought to be made, however, is determined by state rather than federal law. *Aquilino v. United States*, 363 U.S. 509, 4 L. ed. 2d 1365, 80 S. Ct. 1277, (1960).

The case of *Provident National Bank v. Hartnett Co.*, 100 Texas 214, 97 S.W. 689 (Supreme Court of Texas, 1906),

is direct authority for the proposition that the ownership of the Casco accounts in question here passed from Casco to the First National Bank in Dallas, petitioner's assignor, in August and September, 1959 and prior to the time any liens were asserted by the government in 1960. Having sold its right of payment to the bank, the taxpayer had no interest in the accounts here involved when the government's tax assessments were made.

Contrary to the holding of the Court of Appeals in this case, relying upon *Parker Square State Bank v. Triangle Supply Co.*, 364 S.W. 2d 418 (Tex. Civ. App., 1963, writ ref'd n.r.e.), the language of Article 260-1, Section 6, Vernon's Ann. Tex. Civ. Stats., does not give priority to a government tax lien over an unrecorded assignment. *United States v. Ray Thomas Gravel Company, Inc.*, 373 S.W. 2d 333 (Tex. Civ. App., 1963), reversed on another issue in 380 S.W. 2d 576 (Supreme Court of Texas, 1964); *United States v. Lester*, 235 F. Supp. 115 (D.C., S.D. N.Y., 1964).

Further, the *Parker Square* case is in conflict with the decision of the Supreme Court of Texas in *Quinn v. Dupree*, 157 Texas 441, 303 S.W. 2d 769 (1957).

The court should therefore exercise its jurisdiction to resolve the conflict arising from the decision of the Court of Appeals in this case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit to the end that this cause may be reviewed and determined by this Court; that the decree of

the Court of Appeals for the Fifth Circuit be reversed and the decree of the District Court be reinstated, and that petitioner be granted such other and further relief that may be proper.

Respectfully submitted this 3d day of October, 1967.

Robert F. Ritchie

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1100 Republic Bank Building,
Dallas, Texas 75201,

Attorney for Petitioner,
Waller C. Boedeker.

CERTIFICATE OF SERVICE

I hereby certify that the within Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been duly served upon counsel for all opposing parties in this case, pursuant to Rule 33 of this Court, as follows: by depositing copies of same in a United States mail box, with first class postage prepaid, addressed to Mr. Phillip I. Palmer, Jr., Palmer, Palmer & Burke, 2130 First National Bank Building, Dallas, Texas 75202, Counsel for Harold C. Abramson, Trustee for Casco Chemical Corporation, Bankrupt, and Hon. Melvin M. Diggs, United States Attorney, United States Courthouse, Fort Worth, Texas, counsel for the United States of America, and by depositing copies of same in a United States mail box, with air mail postage prepaid, addressed to Hon. Mitchell Rogovin, Assistant Attorney General, Department of Justice, Washington, D. C. 20530, and the Solicitor General, Depart-

ment of Justice, Washington, D. C. 20530, counsel for the United States of America, this 31 day of October, 1967.

Robert F. Ritchie

ROBERT F. RITCHIE

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23127

HAROLD C. ABRAMSON, Trustee for Casco Chemical Corporation, Bankrupt,

Appellant,

versus

WALLER C. BOEDEKER,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

versus

HAROLD C. ABRAMSON, Trustee for Casco Chemical Corporation, Bankrupt, ET AL.,

Appellees.

Appeals from the United States District Court for the Northern District of Texas.

(June 23, 1967.)

Before BROWN, COLEMAN, and AINSWORTH, Circuit Judges.

BROWN, Circuit Judge: Unlike their military counterparts, many cases neither die nor fade away. They

simply go on. *Cf. Bros, Inc. v. Grace Mfg. Co.*, 5 Cir., 1965, 351 F.2d 209, 209, note 1, cert. denied, 1966, 383 U.S. 936, 86 S.Ct. 1065, 15 L.Ed.2d 852. So it is here. Now back from a denial of relief on the merits after an earlier reversal for trial, *In re Casco Chemical Co.*, 5 Cir., 1964, 335 F.2d 645, an intervening appeal which effectually reduced the amount of the Government's tax lien, *Cash v. Campbell*, 5 Cir., 1965, 346 F.2d 670, and a similar action ending adversely to the trustee in Kansas,[1] we must decide the merits.

The immediate question is whether the Trustee in Bankruptcy for Casco, through stepping into the shoes of one or more of three actual existing creditors is entitled to set aside distribution of funds due the Bankrupt for goods sold by it. This turns on several subsidiary questions. The first is whether the date of bankruptcy is the date of filing the original petition (October 4, 1961), or the date of the amended petition filed more than four months thereafter on February 26, 1962. If the latter, all washes out with the possible exception of the Government's tax lien. If the earlier date prevails, several questions arise under Texas law and its accounts receivable notification act.[2] The first is whether the debt was a cov-

[1] See the unpublished opinion of Judge Wesley E. Brown, U.S. District Judge, Abramson, Trustee v. Excel Packing Co., Inc., D.C.Kan., W-2976, September 22, 1966. We are informally advised that subsequent to the judgment and the Trustee's notice of appeal in November 1966, the appeal to the Tenth Circuit was pursuant to the Trustee's stipulation of March 15, 1967, dismissed on March 21, 1967.

[2] Tex.Rev.Civ.Stat.Ann. art. 260-1, "Accounts and accounts receivable; notices; records." This provision was repealed effective June 30, 1966, Acts 1965, 59th Leg., vol. 2, p. 1, ch. 721, §10-102. It is now covered by the Uniform Commercial Code. See note 14, infra.

ered account receivable, not an excluded debt represented by a negotiable instrument. Second, if covered, the question is whether the failure to record the statutory notice subordinates the unrecording assignee to subsequent liens. We answer all in favor of the Trustee (and Government) and reverse.

I.

Date of Bankruptcy

For this and the other problems no purpose is served in repeating in detail the facts set out in our prior opinion. 335 F.2d 645, 646-48. The facts before the trial Court and on this appeal are drawn from a stipulated record. On October 5, 1961, the consent order was entered by the District Court which gave rise to the asserted vulnerable transactions. (Notes 11, 12, 335 F.2d 645, 647). The day before, October 4, 1961, an involuntary petition in bankruptcy was filed by one creditor which alleged three acts of bankruptcy in conclusory general terms.[3] On February 26, 1962, more than four months after October 5, 1961, an amended petition was filed which in factual detail set forth the interpleaded judgment of October

[3] Paragraph 6: "Within four months next preceding the filing of this petition the said Casco Chemical Company committed an act of bankruptcy in that:

"(a) Made or suffered transfers of its property fraudulently under and within the meaning of Section 67d of the Bankruptcy Act [11 USCA §107d(2)].

"(b) It has concealed its assets with intent to hinder, delay or defraud its creditors [11 USCA §107d(2)(d)].

"(c) Made and suffered preferential transfer as defined in Subdivision (a) of Section 60 of the Bankruptcy Act [11 USCA §96a]."

5, 1961, and the transfer of the sums to the four named claimants.[4] This was followed by the formal withdrawal of the defense by Casco, the Bankrupt, and an adjudication by agreement and default.

Reaching the conclusion that a plenary action, not summary proceeding, was required, the District Court earlier held, 335 F.2d 645, Part II, 648-50, that the date of bankruptcy was October 4, 1961, not the date of the amendment, February 26, 1962. In affirming lack of summary jurisdiction, we held that the date of bankruptcy was a matter for determination in the plenary proceedings to be held on remand, 335 F.2d 648. On the remand, the District Court changed its view and held that the date of bankruptcy was February 26, 1962, not the date of the original petition.[5]

Although the parties and the Court below persist in discussing this problem in terms of the doctrine of relation back, see 2 Collier, Bankruptcy ¶18.23 and ¶18.26 (14th ed. 1966), the answer cannot be found there. For it is perfectly obvious whether on general principles or on F.R.Civ.P. 15(c) that allegations concerning events occurring subsequent to the filing of the original petition cannot possibly relate back to the earlier date of filing. But that is a long way from

[4] This included Excel Packing Co., Superintendence Company, Inc., McRedmond Bros., Inc., and Waller C. Boedeker. Boedeker, who had guaranteed the payment of Casco's indebtedness to the Bank, discharged the debt and received an assignment of all of the Bank's claims against Casco. References herein to the Bank or to the Assignee, therefore, refer to the interest of Boedeker as well.

[5] This was likewise the holding of Judge Wesley E. Brown in the Kansas proceeding against Excel, see note 1, supra.

an enforced conclusion that the date of bankruptcy here must have been the date of the amended petition.

It is true, of course, that to initiate an involuntary proceeding, one of the six specified acts of bankruptcy must have occurred within four months prior to the filing of the petition. §3, 11 USCA §21. But once a single act of bankruptcy has occurred and the petition has been timely filed with adequate allegations, the power of the Trustee acting for the general estate to reach back and unscramble transactions which are vulnerable to specific sections of the Act, e.g., §§67, 70, etc., is not restricted to those transactions occurring within the four months' prefiling period.[6] More important, neither is it restricted to those specific transactions set forth in the involuntary petition. In other words, a single act of bankruptcy adequately alleged—no matter how insignificant in terms of dollars or relation to other unalleged suspect transactions—triggers the whole thing.[7]

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[6] Some transactions are, of course, vulnerable for four months only. See, e.g., second act of bankruptcy under §60, 11 USCA §96: 1 Collier, Bankruptcy, ¶¶3.201, 3.202 (14th ed., 1966).

The trustee's powers under other sections of the Act are not so restricted:

"Section 70e(1) prescribes no conditions or time limits within which transactions are deemed voidable. It merely incorporates the applicable state or federal law in this regard. Consequently, the 'four months' or one year's limitations established in §§60 and 67 are inapplicable in a suit under §70e."

4 Collier ¶70.71 at 1547; Blackford v. Commercial Credit Corp., 5 Cir., 1959, 263 F.2d 97, 110. See also §11, 11 USCA §29, minimum 2-year statute of limitation.

[7] In this sense, at least, the petition serves as even less notice than the generalized complaint (F.R.Civ.P. 8(a) and forms 8 & 9). The "right" of a creditor to hang on to his self-help priority may not, therefore, be equated with concepts of fair notice from pleadings.

Phrasing the problem as we do, whether the allegations of the involuntary petition are adequate is essentially a question of procedure. Through General Order 37[8] this brings directly into play the Federal Rules of Civil Procedure "in so far as they are not inconsistent with the Act or with [the] general orders." 1 Collier ¶2.81; *Georgia Jewelers, Inc. v. Bulova Watch Co.*, 5 Cir., 1962, 302 F.2d 362, 366. Except that §18c, 11 USCA §41, requires that "petitions for both voluntary and involuntary bankruptcy shall be verified under oath," 2 Collier ¶18.36, nothing in General Order 5 prescribing the content and form of the petition nor in the official forms, see General Order 38, is inconsistent with F.R.Civ.P. 8(a)(2) which requires merely a "short and plain statement," the standard under 8(e) being that each "* * * averment of a pleading shall be simple, concise, and direct." See 2 Collier ¶18.09[2.2], citing 2 Moore, Federal Practice, ¶8.12, it should "be noted that * * * [Rule 8(a)(2)] does not require the pleading of facts as distinguished from conclusions of law." There is no reason, therefore, why the involuntary petition should not be read with all of the liberality of the usual civil complaint. *Conley v. Gibson*, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; *Georgia Jewelers, Inc. v. Bulova Watch Co., supra*, 302 F.2d at 366; *Barber v. Motor Vessel "Blue Cat"*, 5 Cir., 1967, ... F.2d ....,

[8] General Order 37: "In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding." 11 USCA following §53.

.... AMC ...., and see especially cases cited p...., n. 1 [No. 23182, Jan. 31, 1967, slip op. p. 2 n. 1].

Consequently, as Collier points out, despite the sometime use of the term "jurisdictional facts" as a basis for a particular procedural ruling, deficiencies in pleadings cannot really be "jurisdictional." "There is no basis for assuming that the pleading of an act of bankruptcy, for instance, is any more 'jurisdictional' than the pleading of a petitioning creditor's claim. Nor is it reasonable to suppose, on reading the Act and the General Orders, that a given defect in pleading might be 'jurisdictional' * * * at one stage of the proceedings, and 'non-jurisdictional' at a subsequent stage. Far more preferable is the view that defects in pleadings are not 'jurisdictional'; that whether or not they may be cured depends upon the power of amendment, and that a bankruptcy court has ample jurisdiction to permit amendments." Serving as a prelude for our further discussion, the text concludes, "Aside from a few isolated instances, juridical opinion amply supports these views." 2 Collier ¶18.05 at p. 20.

But in considering the cases, a distinction must be kept carefully in mind. The fact that the Bankruptcy Court on a timely objection made by the debtor-alleged-bankrupt concludes that the allegation of the act of bankruptcy is not factually detailed enough and that therefore an amendment is required in the interest of good orderly administration, is not the equivalent of a holding that the petition is so total-

ly defective that it is a nullity, the jurisdiction of the court has never been invoked, and the critical times have not begun to run.[9]

The key is the defensive position taken by the debtor-alleged-bankrupt. This is surely so ever since the 1938 Amendments[10] which took away from creditors the right to contest an involuntary petition. This was a deliberate congressional choice to avoid abuses arising from the self-interest of creditors seeking by procedural or other objections to hang on to self-help preferences which were otherwise vulnerable. 2 Collier ¶18.33. Since the creditor cannot oppose the petition directly, he ought not to have the right to gain the same benefit through a collateral attack.[11]

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[9] Of course the expressions are frequently that allegations in the words of the statute are insufficient.

See, e.g., 2 Collier ¶18.11, quoting from Matter of Hark Bros., D.C.Pa., ..., 135 Fed. 603: "There is one rule, however, followed by all courts, that allegations of acts of bankruptcy in a petition in the language of the Act without setting forth any other facts or circumstances are insufficient." See also 1 Collier ¶3.106 at pp. 422, 424; ¶3.207 at pp. 452-53; 2 Collier ¶18.26 at pp. 70-71.

[10] Prior to the 1938 Amendments §18b, 11 USCA §41(b), read:

"18b. The bankrupt or any creditor may appear and plead to the petition within five days after the return day or within such further time as the court may allow." See 2 Collier ¶18.01, p. 8, n. 12.

[11] 2 Collier ¶18.26, p. 69: "It was held, prior to the Act of 1938, that the doctrine of relation back would not be applied to the prejudice of creditors contesting adjudication on a defective petition * * *. Under §18b of the 1938 Act, however, creditors may no longer contest the involuntary petition. It seems, therefore, that where the bankrupt in such a case consents to an amendment to allege a new act of bankruptcy, the amendment should relate back to the date of the original petition. It would appear as unwarranted benevolence for a court to refuse application of the doctrine of relation back to protect liens or preferences in behalf of

Against this background we align ourselves with the First, Second, Third, Seventh and Eighth Circuits in holding that allegations in the wording of the statute, although vulnerable to objection by the debtor-alleged-bankrupt thus setting in train questions of relation back of proferred amendments, are not "jurisdictionally" defective.

Thus, in *Commercial Credit Corp. v. Skutt*, 8 Cir., 1965, 341 F.2d 177, where the petition was challenged as "so fatally defective" on its face as to deprive the Bankruptcy Court of jurisdiction, the Eighth Circuit has this to say. "This contention overlooks the fact that the Congress, not the pleadings, vests the District Court with the power or right to act in bankruptcy proceedings. In the instant case, the District Court had jurisdiction of the subject matter by virtue of the federal bankruptcy act. * * *. A defective petition in bankruptcy presents no different problem from a defective complaint generally. It does not deprive the court of jurisdiction and is subject to amendment." 341 F.2d at 180, 181. Similarly, Chief Judge Lumbard, after recognizing that an allegation of an act of bankruptcy in the statutory language

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the creditors to whom the Bankruptcy Act has denied the right to contest adjudication on an involuntary petition."

Indeed, even prior to the 1938 Amendment the bankrupt's action was controlling.

"If the bankrupt consents to the amendment it will relate back to the date of the original petition, even where a creditor, affected by the amendment, objects thereto. This is illustrated in *International Silver Co. v. New York Jewelry Co.*, [6 Cir., ..., 233 Fed. 945] decided by the Sixth Circuit and impliedly approved by the Second [citing Matter of Fuller, 2 Cir., 1926, 15 F.2d 294] and Eighth [citing Hovland v. Farmers State Bank of Christine, 8 Cir., 1926, 10 F.2d 478] Circuits." 2 Collier ¶18.26 at p. 72.

"is improper [since] a reasonably higher degree of particularity is required in an involuntary petition * * *" made plain for the Second Circuit its stand on "jurisdiction." "It is clear that the defects in the petition were not jurisdictional so as to require an outright dismissal and that the District Court had the power to allow amendment of the petition so that defects in pleading could be cured." *South Suburban Safeway Lines, Inc. v. Carcards, Inc.*, 2 Cir., 1958, 256 F.2d 934. This was echoed by him in *Minkoff v. Steven Jrs.*, 2 Cir., 1958, 260 F.2d 588, 589-90, where the Court declared that "merely pleading in broad terms does not amount to failure to state a claim, especially when as here the generality of the pleading arises from the use of the statutory language." Long before, the Third Circuit had likewise said "The fact that the acts of bankruptcy were set out merely in the language of the Bankruptcy Act is no ground for dismissing the petition * * *," *Kay v. Federal Rubber Co.*, 3 Cir., 1930, 46 F.2d 64, 65, as had the First Circuit about the same time in these simple direct words, "The defect was not jurisdictional." *Harney Shoes, Inc. v. National Fabrics & Finishing Co.*, 1 Cir., 1937, 44 F.2d 517, 518. More recently the Seventh Circuit, citing *Harney* sounded the same views. *Bixby v. First National Bank*, 7 Cir., 1957, 250 F.2d 713. And we agree with the Seventh Circuit's reading of our early case, *In re Louisell Lumber Co.*, 5 Cir., 1913, 209 Fed. 784, of which the Court had this to say. "The weakness of defendant's position is emphasized by its reliance upon In re Louisell Lumber Co. * * * Defendant fails

to discern that in the Louisell case there was no defective statement of an act of bankruptcy. Instead, there was a complete absence of an allegation of any act of bankruptcy." *Bixby v. First National Bank, supra*, 250 F.2d 713 at 718.

Whatever might have been the case had the debtor persisted in denial of bankruptcy,[12] when the debtor here withdrew his answer and acquiesced in adjudication by default,[13] the date of bankruptcy was fixed as of the date of the original petition. The District Court was in error in finding to the contrary.

II.

Status of the Debt as an Account Receivable

Under the arrangement between Casco and the Bank, Casco would make out its invoice for goods sold to Bunge. Casco then drew a draft on Bunge with the attached invoice covering the goods sold. After first verifying each transaction with Bunge, the Bank then purchased each invoice-draft from Casco for its

[12] Propriety of amendment frequently turns on questions of relation back. Under the policies of the Rules and particularly F.R.Civ.P. 13(c), the Second Circuit has liberalized its approach over many older cases so heavily pressed here by the Bank. See Glint Factors, Inc. v. Schnapp, 2 Cir., 1942, 126 F.2d 207; cf. Dworsky v. Allanjay Bias Binding Corp., 2 Cir., 182 F.2d 803; Matter of Ideal Mercantile Corp., 2 Cir., 1957, 244 F.2d 828, cert. denied, 1957, 355 U.S. 816, 78 S.Ct. 84, 2 L.Ed.2d 63.

[13] The Second Circuit has several times emphasized the waiver of objections or defenses from failure to assert them under F.R.Civ.P. 12(h). See Minkoff v. Stephen Bros, Inc., 2 Cir., 1958, 260 F.2d 588; South Suburban Safeway Lines, Inc. v. Carcards, Inc., 2 Cir., 1958, 256 F.2d 934; In re S.W. Strauss & Co., 2 Cir., 1933, 67 F.2d 605.

face amount. For the period of time between payment by the Bank of the funds to Casco until acceptance of the draft and payment by Bunge to the Bank's correspondent, the Bank charged, and Casco paid, eight per cent interest. Each draft showed an endorsement by Casco, the drawer, to the Bank. 335 F.2d 645, 656.

The Bank argues that this assignment, prior in time was prior in right, because Art. 260-1, the Texas non-notification accounts receivable recording statute (see note 2, *supra*), expressly excludes from the statutory definition of an "account receivable" any debt in which the "right to payment is * * * represented by * * * a negotiable instrument * * *"[14]

A faint argument is made that as expressly declared in *Inland Refining Co. v. Robinson*, 1953, 152 Tex. 291, 256 S.W.2d 843, a draft is not a negotiable instrument until it is accepted. But we place no reliance on this decision which must be regarded as suspect in view of the clear terms of the Texas NIL, §126, Tex.Rev.Civ.Stat.Ann. art. 5940.

From the whole transaction it is perfectly plain that payment was not represented by these drafts.

[14] Art. 260-1, §1. "In this Act, unless the context otherwise requires:

"(1) 'Account' or 'account receivable' means an existing or future right to the payment of money presently due, or to become due (a) under an existing contract or under a future contract entered into during the effective period of the notice of assignment * * *; (b) which right to payment is not secured by a chattel mortgage * * * or other instrument which may be filed for record * * *; and (c) which right to payment is not represented by (A) a judgment, (B) a negotiable instrument, * * *."

Bunge had received the goods. Casco looked to Bunge for payment for the goods. Receipt of the goods at the prices and quantities specified in the invoices gave rise to an implied, if not an express, obligation to pay for them. But Bunge had no liability on the drafts. Texas NIL §127, Tex.Rev.Civ.Stat.Ann. art. 5940; 9 Tex.Jur. 2nd, Bills and Notes §125. Bunge became liable on the drafts only upon acceptance which, being sight drafts, meant on payment. Of course the drawer, Casco, remained liable on its warranty on the drawee's failure to accept (or pay), Texas NIL §61, Tex.Rev.Civ.Stat.Ann. art. 5936, §61. But there is nothing to indicate here that the Bank was content to rely solely upon the secondary liability of the drawer Casco. On the contrary, the security instruments, Boedeker's guaranty given to the Bank, and the Bank's State Court suit against Bunge which ultimately became the federal interpleader's action, 335 F.2d 645 at 647, all combine to demonstrate that the Bank, whether as purchaser or pledgee, or both, treated as the transferred indebtedness Bunge's obligation to pay, Casco's right to receive, the invoice value of the goods.

The assignment to the Bank was therefore subject to Art. 260-1.

III.

Effect of Failure to Record Bank's Assignment

On the assumption that Art. 260-1 applies to this assignment, the Bank next argues that the purpose of

the statute is clearly to protect assignees only. The failure to record gives no protection to subsequent attaching or garnishing creditors (i.e., Superintendence) or to statutory lien holders (i.e., the Government).[15]

Since the Trustee has only to avoid the Bank's assignment as to one actual creditor under §70e, 11 USCA §110e,[16] this contention is hardly availing This is so because Excel (335 F.2d 645, 646, note 7, 12) obtained a formal assignment of a part of the same Bunge indebtedness on November 17, 1959, and it was recorded the next day, November 18, in Dallas. Excel's assignment, as a protected assignment, made the Bank's unrecorded assignment voidable.[17]

[15] The Government's tax claims were assessed beginning January 22, 1960, and extending through February 3, 1961. Statutory lien notices were filed between April 12, 1960, and April 7, 1961.

[16] The Trustee's §70e powers can lead to some weird Tinker-to-Evers-to-Chance successive avoidance of transfers. See Cherno v. Dutch American Mercantile Corp., 2 Cir., 1965, 353 F.2d 147; In re Baumgartner, 7 Cir., 1931, 55 F.2d 1041; cf. Bergin v. Waterson, 10 Cir., 1960, 279 F.2d 193. Mixing the figuratives a bit more, the Eighth Circuit characterizes the position of the trustee as standing "in the shoes of the bankrupt," but also in the overshoes of the creditors * * *. Schneider v. O'Neal, 8 Cir., 1957, 243 F.2d 914, 918.

In any event if the transfer is avoidable at all by any creditor, it is avoidable in full for all creditors regardless of the dollar amount of the prevailing claim. Moore v. Bay, 1931, 284 U.S. 4, 52 S.Ct. 3, 76 L.Ed. 133; Roscoe Moss Co. v. Duncan, 9 Cir., 1964, 336 F.2d 670; In re Plonta, 6 Cir., 1962, 311 F.2d 44; Levine v. Johnson, 5 Cir., 1961, 287 F.2d 623; Corley v. Cozart, 5 Cir., 1940, 115 F.2d 119.

[17] Art. 260-1, §6. "Whenever any person * * * shall in good faith take a protected assignment of any account or accounts, * * * all creditors of, and all subsequent assignees, purchasers and transferees of or from the assignor shall be conclusively deemed to have received notice of such assignment * * *; and after such filing for record, no purchaser from the assignor * * *, and no prior or subsequent assignee or trans-

We reject altogether as completely unfounded in this stipulated record the District Court's holding that Excel did not take the protected assignment "in good faith" within the meaning of §6, note 17, *supra*. Because the Excel assignment was taken in payment of, or to secure, a pre-existing debt, the Court mistakenly reasoned that since this would disqualify one as a bona fide purchaser for value and without notice[18] this meant that Excel was not in "good faith." "Good faith" is only one of three requirements necessary in order for one to be a BFP of realty, the question involved in the cases cited note 18, *supra*, and an antecedent debt can constitute valuable consideration for an assignment, *Quinn v. Dupree*, 1957, 157 Tex. 441, 303 S.W.2d 769.

The Excel assignment being protected, the Bank's assignment is voidable as to it, and this alone would be sufficient. But in view of the holdings in the Kansas case (see note 1, *supra*) which might give rise to some notions of collateral estoppel as to the Excel assignment triggering the Trustee's recovery, we think it clear that the Bank's assignment was equally, if not more so, vulnerable to the Superintendence attachment[19] and the Government's tax lien.

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feree of the assignor, holding an assignment not protected * * * shall in any event have * * * any right in the account * * * so assigned or in the proceeds thereof * * * superior to the rights, therein of the assignee named in such prior protected assignment."

[18] The trial Judge cited Hopper v. Tancil, Tex.Com.App., 1928, 3 S.W.2d 67; La Brie v. Cartwright, Tex.Civ.App., 1909, 115 S.W. 785 (no writ hist.); Sparks v. Taylor, Tex.Civ.App., 1905, 87 S.W. 710 [reversed, 1906, 99 Tex. 411, 90 S.W. 485].

[19] See note 1, supra. Judge Wesley Brown held that the Superintendence attachment, having been levied on the same day as the execution of Excel's assignment, November 17, 1959, which was not perfected until recorded the following day, November 18, primed Excel's assignment.

For this we take our signal from the Texas Courts. And from *Parker Square State Bank v. Triangle Supply Co.*, Tex.Civ.App., 1963, 364 S.W.2d 418 (writ ref'd n.r.e.) it comes in loud and clear. That Court considered in detail the question whether a lien creditor who acquired his lien after delivery of a valid written assignment of accounts acquired a right to the funds superior to that of the assignee where the assignee, as true here, had not filed notice of the assignment under the recording statute. The Court had this to say. "Article 260-1 does not so clearly provide that an assignee's failure to record enables a creditor to establish superior rights by garnishing the account, or otherwise fixing a lien, but we think such was its purpose. * * * [T]he trial court correctly held that the rights of the appellants as to the accounts [as to] which they failed to file notice of their assignments were inferior to the rights of subsequent lien creditors." 364 S.W.2d 418 at 423.

The Bank tries here, as the banks did in *Parker Square*, 364 S.W.2d at 423, to convince the Court that *Parker Square* conflicts with the Supreme Court's earlier decision in *Quinn v. Dupree*, 1957, 157 Tex. 441, 303 S.W.2d 769. Our unwillingness to make a non-*Erie* reading gains some support, we think, from the Court's rejection over the strong dissent of Judge Hughes of the same argument in *South Main State Bank v. State of Texas*, Tex.Civ.App., 1963, 365 S.W. 2d 946, writ ref'd n.r.e. Nor on this record are these considerations altered by *United States v. Ray Thom-*

as Gravel Co., Inc., Tex.Civ.App., 1963, 373 S.W.2d 333, reversed, 1964, 380 S.W.2d 576.[20]

And, of course, to the attachment lien of Superintendence there may also be added the Government's tax lien, 26 USCA §6321, 6322, 6323.

The upshot of it is that the Government, Superintendence and Excel had rights superior to the Bank's earlier non-recorded assignment. That is all the Trustee needed. So this case must now go back for the entry of a judgment requiring the Bank's assignee Boedeker to pay to the Trustee[21] the amount received by him. As with another tenacious case, *Bros Inc. v. W. R. Grace Mfg. Co.*, 5 Cir., 1965, 351

[20] In *Ray Thomas Gravel*, the Court of Civil Appeals held that under Art. 260-1, the "statutory method of affording protection to an assignee is permissive * * * not exclusive," and that therefore an assignment not in compliance with the statute would not be invalid where the Government had actual notice of the prior assignment. This holding was not challenged by the Government on appeal to the Supreme Court of Texas.

Compare Miami National Bank v. Knudsen, 5 Cir., 1962, 300 F.2d 289, where this Court held, for Florida, that the Florida Accounts Receivable Act, Fla. Stat. Ann. ch. 524, establishes "a mandatory, exclusive system of perfecting assignments of accounts receivable," and that actual notice of the assignment to the account debtors will not suffice. 300 F.2d at 289, 293-95. Also discussing the Florida statute but providing an analysis and comparison of the Texas statute and its application under Republic National Bank v. Vial, 5 Cir., 1956, 232 F.2d 785, and Keeran v. Salley, Tex.Civ.App., 1951, 244 S.W.2d 663 (writ ref'd), is Ribaudo v. Citizens National Bank, 5 Cir., 1958, 261 F.2d 929 at 936-37.

[21] We have not passed upon whether the balance due the Government is subject to administration and prior wage claims under §67c, 11 USCA §107c of the Bankruptcy Act. See Lawrence v. United States, 5 Cir., 1967, ...F.2d...., ... nn. 39-41 and accompanying text [No. 22573, May 9, 1967, slip op. p. 26-27, nn. 39-41].

F.2d 208, 209, note 1, cert. denied, 1966, 383 U.S. 936, 86 S.Ct. 1065, 15 L.Ed.2d 852, this multi-Circuit litigation ends with diverse results in the 5th and 10th Circuits, see notes 1, 19, *supra*.

REVERSED WITH DIRECTIONS.

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APPENDIX B

STATUTES INVOLVED

Bankruptcy Act, Section 70e, 11 U.S.C.A. §110(e):

(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.

(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benetfit of the estate; *Provided, however*, That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws.

(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

Internal Revenue Code of 1954, Section 6321, 26 U.S.C.A. §6321:

Sec. 6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Federal Rules of Civil Procedure, Rule 15(c):

Rule 15. Amended and Supplemental Pleadings

* * * * *

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Vernon's Annotated Texas Civil Statutes, Article 260-1, Section 1 and Section 6:

Art. 260-1. Accounts and accounts receivable; notices; records

Definitions

Section 1. In this Act, unless the context otherwise requires:

(1) "Account" or "account receivable" means an existing or future right to payment of money presently due, or to become due (a) under an existing contract or under a future contract entered into during the effective period of the notice of assignment hereinafter provided for; (b) which right to payment is not secured by a chattel mort-

gage, a conditional sale contract, or other instrument which may be filed for record in a public office of this or another state or of the United States and which instrument was given at or before the time the account was assigned and reserves the title to, or creates a lien upon, goods, the sale of which gave rise to the account; and (c) which right to payment is not represented by (A) a judgment, (B) a negotiable instrument, or (C) a non-negotiable instrument which so represents the obligation that an assignee who takes possession of it takes rights superior to those of a prior assignee of the obligation who did not take possession of the instrument, and (d) the assignment of which right is not subject to special statutory provisions of the state or of the Federal Government relative to the rights of creditors of the assignor or to successive assignees from the assignor; "account" or "account receivable" shall not include any sums of money accruing to a contractor for labor performed or material furnished on any public or private construction contract unless the assignment properly describes the land upon which the improvements are to be constructed and such assignment filed in the office of the County Clerk of the county wherein the land lies; which assignment shall not be effective prior to such filing.

(2) "Assignee", "assignment", "assignor", and "debtor" are limited respectively to an assignee, assignment, assignor of, and debtor on an account receivable.

(3) "Contract" includes express contracts, written or oral, and implied contracts, such as an obligation to pay for goods received or services rendered without an express contract.

(4) "Assignment" means any transfer of an account, other than by operation of law, including

but not limited to a transfer as security, the creation by agreement of a lien on an account, and sales of accounts.

* * * * *

Record as notice

Sec. 6. Whenever any person, firm or corporation shall in good faith take a protected assignment of any account or accounts, which shall not have been satisfied, cancelled or released by the assignor, all creditors of, and all subsequent assignees, purchasers and transferees of or from the assignor shall be conclusively deemed to have received notice of such assignment, dating from the time of the filing for record of the notice of assignment hereinabove provided; and after such filing for record, no purchaser from the assignor, no creditor of any kind of the assignor, and no prior or subsequent assignee or transferee of the assignor, holding an assignment not protected, or holding an assignment under a notice of assignment subsequently filed for record, shall in any event have, or be deemed to have acquired, any right in the account or accounts so assigned or in the proceeds thereof, or in any obligation substituted therefor, superior to the rights therein of the assignee named in such prior protected assignment.

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In the

Supreme Court of the United States

OCTOBER TERM, 1967

No. 682

WALLER C. BOEDEKER,

Petitioner,

v.

HAROLD C. ABRAMSON, TRUSTEE for CASCO CHEMICAL CORPORATION, BANKRUPT and UNITED STATES OF AMERICA,

Respondent.

RESPONSE OF HAROLD C. ABRAMSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The facts of this matter have never been in dispute. Indeed, the cause was presented to the District Court upon stipulations. Although Petitioner's detailed presentation of these agreed facts seem, in some instances, to go beyond the stipulation, the essential facts are easily stated as follows:

(a) An involuntary bankruptcy petition filed against Casco Chemical Corporation (Casco), alleging acts of bankruptcy in the words of the statute only.

(b) An amended involuntary bankruptcy petition was filed, still alleging the same acts of bankruptcy in the words of the statute, but also adding a new specific act which had occurred after the first involuntary petition was filed. (It should, properly, have been styled a supplemental pleading, and avoided all of this controversy)

(c) Casco withdrew its answer, and was adjudicated bankrupt by its consent.

(d) Between the filing of the first involuntary petition and the amended involuntary petition, Waller C. Boedeker (Petitioner), a former officer, director and shareholder of Casco, captured for his own use some two-thirds of the remaining assets of Casco.

(e) The Trustee, upon his election by the creditors, filed this suit against Boedeker, claiming the $55,000 was taken after the bankruptcy had begun.

QUESTIONS PRESENTED FOR REVIEW

If the Bankruptcy began with the first involuntary petition, and before Boedeker seized most of Casco's assets for himself, then the Trustee can recover for the benefit of all creditors, and Boedeker will be reduced to receiving only his fair share. On the other hand, if the Bankruptcy proceeding began only with the amended involuntary petition, then Boedeker was successful in recouping his own loss ahead of the other creditors, who would then receive noth-

ing. The crucial question, then, deals with the effective date of bankruptcy, and might be posed:

> Is Bankruptcy commenced with the filing of the first involuntary petition or only with the last amendment of the involuntary petition?

Respondent cannot concur in the question as stated by the Petitioner, dealing as it does with the 'act of bankruptcy' upon which adjudication is based and the Doctrine of Relation Back. First, adjudication was not based upon any of the acts of bankruptcy alleged, but upon the consent of the bankrupt. Second, The Court of Civil Appeals below went to great lengths to point out that relation back was not an element in determining the date of bankruptcy. It expressly stated that the later pleading could not relate back to the earlier pleading, but such fact was no bar to a finding that bankruptcy began with the first petition. Petitioner's question for review is so posed that he seems to feel that the Court below is permittiing the later pleading to relate back. This respondent does not so read the opinion of the Court of Appeals.

ARGUMENT

I

A Bankruptcy Preceeding Begins With The First Involuntary Petition

Perhaps the basic misconception of the Petitioner is the failure to perceive that there are actually two law suits here, as in most involuntary bankruptcy proceedings. The first law suit was against Casco Chemical Corporation; the second suit is against Waller C. Boedeker. The First was

an involuntary bankruptcy proceeding between petitioning creditors on the one hand and the alleged bankrupt on the other. The second is a civil suit brought by the Trustee in Bankruptcy against a favored creditor to set aside a voidable transfer. Neither the Trustee nor the Petitioner were parties to the first law suit, and they are concerned only with the date of its beginning and its result. With the intermediate steps they had nothing whatever to do.

The Bankruptcy Act as a whole presents a Congressional scheme for equal distribution among creditors when there is not enough to pay all in full. The basic line of demarcation is the date of bankruptcy, for this is the date when all assets of the bankrupt are deemed to come into the custody of the Court, and therefore the date of inception of the trustee's title. This is also the date when self-help and unilateral collections must cease.

It is true that, back in the first stage, the act of bankruptcy must be alleged within four months of its occurrence. This short term statute of limitations is found in Section 3b of the Bankruptcy Act, and is obviously intended to protect an alleged bankrupt from being charged with acts of bankruptcy which are remote in time. With an adjudication, its function would seem to be at an end. It is also true that numerous cases can be found in which an alleged bankrupt is relying upon Section 3b to prevent an amended pleading from setting up a new act of bankruptcy more than four months after it took place. The petitioning creditors may then contend that the new pleading relates back to the earlier pleading, and the question of relation back be-

comes quite material, requiring the Court to examine both pleadings and determine if the later is an amendment to the earlier. These cases all arise at the first stage and have to do only with the issue of adjudication itself, but have no bearing upon the question of when the bankruptcy began in a second stage suit.

Petitioner's bald statement that the opinion below is the first decision which recognizes these two stages does not bear close analysis. Without exception every one of the "conflicting" authorities cited by petitioner are first stage cases, dealing with a contest of adjudication itself. Not one is authority for permitting a creditor to use relation back after adjudication. The only new authority urged is that of *Wynne v. Rochelle*, which is not only a first stage case but also uniquely involved two separately filed, docketed and numbered involuntary petitions against the same alleged bankrupt. One was dismissed, the second resulted in adjudication. The Attempt to consolidate the two separate cases failed, but not upon any issue urged by either party to this proceeding.

There are, of course, authorities which have dealt with the precise issue, all of which agree with the opinion below. This Court long ago decided this very issue in *International Bank v. Sherman*, 101 U.S. 403 (1879). There, as here, the creditors preferred themselves between the first and the amended involuntary petitions. There as here, the creditors sought to defeat the trustee's suit against them by delaying the date of bankruptcy until the second petition upon the grounds that it did not relate back. This Court held that

the creditors are concerned only with the original commencement of the involuntary proceedings and the result, but not with any of the intermediate steps. The bankruptcy was held to have begun with the first involutary petition.

More recently, in *Commercial Credit Corporation v. Skutt*, 341 F. 2d 177 (8th Cir. 1965) the preferred creditors, when sued by the trustee, also sought to defeat the trustee by postponing the date of bankruptcy. The Court of Appeals there held that the bankruptcy began with the first involuntary petition, and that the creditors had no standing to challenge the pleadings which led to adjudication.

Again, in *Bixby v. First National Bank of Elwood*, 250 F. 2d 713 (7th Cir. 1957) the first petition (as here) alleged the acts of bankrutcy in the words of the statute. After adjudication, the preferred creditors made the same efforts to defeat the trustee. Although the Court agreed that the second petition would not have related back in the face of challenge by the bankrupt in a contest of adjudication, once there was adjudication, then the bankruptcy began with the first petition. The Court pointed out that there had only been one Bankruptcy case from commencement to conclusion, with the obvious commencement being the first petition.

The leading Treatise on Bankruptcy Law points out the same distinction in a quotation squarely on point:

> "It should be note that the rule that the new act of bankruptcy alleged in an amendment relates to the date of the amendment is limited only to the computation for the four-month period for purposes of adjudica-

> tion. After adjudication the trustee takes title to the Bankrupt's property as of the date of the original petition and may recover any property transferred by the bankrupt after the filing of the original petition, even though the adjudication was made on an act of bankruptcy alleged in an amended petition filed after the transfers occurred. 2 *Collier, Bankruptcy* 53

Although Petitioner implies that the opinion below is something new, startling and different, in fact the opinion below is in line with settled law, beginning with this Court's opinion in 1879. Petitioner is the one who wishes to seek a change in the law, apparently for the reasons set forth in page 12 of his petition where tears are wept for the bankrupt Casco. The thrust of Petitioner's position would seem to be that if the opinion below stands there will be insufficient protections from a frivilous involuntary bankruptcy petition. Again, this overlooks that the opinion below has nothing whatever to do with the protections available to an alleged bankrupt from a frivilous involuntary petition, and those protections are numerous indeed. What the opinion below will do is serve notice to insiders, favored creditors and others that once an involuntary bankruptcy petition is filed they can no longer seize the debtor's assets for themselves alone. This, as a genuine practical matter without any flights into fantasy, may give a troubled debtor a breathing spell in which to re-organize, file an arrangement or take some other suitable action.

Certainly, Petitioner is a creditor of the bankrupt, having paid out his own money upon his guarantee of the bankrupt's note at the bank, but he is no more a creditor than the many others who also paid out money, goods or services.

No amount of legal reasoning can obscure the basic fact that this particular creditor recouped much of his loss after bankruptcy was filed. Nor can it be concealed that if this creditor should prevail then a fundamental change has occurred in Bankruptcy law in which an involuntary petition is no longer a caveat to the world, the date of judicial liquidation and supervision, and the end of private seizure in favor of equality. Instead, an involuntary petition would be a meaningless gesture signalling the beginning of a race to seize all possible as the race would go to the swift rather than the just.

II

The Issues Of State Law Decided Are Neither Of Importance Nor Incorrectly Decided.

For the reasons stated in the opinion below, all of the decisions cited by the Petitioner were found not to be in point nor helpful, but the issues of state law were determined upon the other authorities cited in the opinion.

This Respondent would only point out, in addition, that each of these issues involved the construction of state statutes which have since been repealed. Effective July 1, 1966, the State of Texas joined 48 other states in enacting the Uniform Commercial Code. At the same time, the Assignment of Accounts Act, Article 260-1 of the Texas Civil Statutes was repealed. Recordation of assignments, and the effect of unrecorded interests under the old Texas statute have given way to security agreements and financing statements under the Code. Moreover, even the Federal Tax

Lien Statute has been amended by Congress since this case began. While construction of these obsolete statutes are of importance in this particular case, and still of historical interest, it can hardly be said that such construction is so important a present issue of state law as to compel this Court to issue its Writ of Certiorari.

PRAYER

WHEREFORE, this respondent prays that the petition for writ of certiorari filed by Waller C. Boedeker be denied.

Respectfully submitted this the .... day of October 1967.

PHILIP I. PALMER,

2130 First National Bank Bldg.
Dallas, Texas 75202

Attorney for Respondent,
Harold C. Abramson.

CERTIFICATE OF SERVICE

I hereby certify that the within Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been duly served upon counsel for all opposing parties in the case, pursuant to Rule 33 of this Court, as follows: by depositing copies of same in a United States mail box, with first class postage prepaid, addressed to Mr. Robert F. Ritchie, 1100 Republic National Bank Building, Dallas, Texas 75201, Counsel for Waller C. Boedeker, and Hon. Melvin M. Diggs, United States Attorney,

United States Courthouse, Fort Worth, Texas, counsel for the United States of America, and by air mail postage prepaid, addressed to Hon. Mitchell Rogovin, Assistant Attorney General, Department of Justice, Washington, D.C. 20530, and the Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for the United States of America, this .... day of October 1967

PHILIP I. PALMER

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 682

WALLER C. BOEDEKER, PETITIONER

v.

HAROLD C. ABRAMSON, TRUSTEE, FOR CASCO CHEMICAL CORPORATION, BANKRUPT, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. The first question involved is whether the trustee in bankruptcy, by stepping into the shoes of one or more of three actual existing creditors of the bankrupt, is entitled under Sections 60, 67, and 70 of the Bankruptcy Act, as amended (11 U.S.C. 96, 107 and 110), to set aside as preferential a distribution of funds to petitioner on October 5, 1961. Such a distribution cannot be vacated if it occurred more than four months before the filing of the petition that initiated this bankruptcy proceeding. Thus, the answer turns on whether the date of bankruptcy is the date of the original involuntary petition, filed on October 4,

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1961, or the date of an amended petition filed on February 26, 1962, more than four months after the payments to petitioner.

Creditors of Casco Chemical Corporation alleged in the October 4 petition three acts of bankruptcy, using the general terms of the statute. Casco opposed the petition. The next day, October 5, the district court, in a different proceeding, entered judgment ordering payment to petitioner as assignee of certain of Casco's unpaid accounts receivable. On February 26, 1962, an amended petition was filed, alleging as an act of bankruptcy the judgment of October 5, 1961, and the resulting payments to petitioner and others. Casco then withdrew its opposition to bankruptcy, and an adjudication by agreement and default ensued. (Pet. A–3—A–4.)

Contrary to the petitioner's contention (Pet. 9–12) the court of appeals did not hold that allegations concerning the October 5 judgment related back to the October 4 petition; the court expressly said of that theory, "the answer cannot be found there" (Pet. A–4).[1] Instead, the court held (Pet. A–5—A–8) that any pleading defect in a petition that merely recites the wording of the statute is not jurisdictional, and that only the debtor may object to such an involuntary petition. Section 18 (11 U.S.C. 41). Thus, whatever might have been the proper result had Casco persisted in resisting bankruptcy, the statute compelled the court of appeals' holding that Casco's acquiescence neces-

[1] This ruling is in accord with those cases alleged to be in conflict (Pet. 9–11), which refuse to apply a relation back theory. Nor is this case like those where there was "a complete absence of an allegation of any act of bankruptcy." (Pet. A–10—A–11.)

sarily fixed the date of bankruptcy as of October 4, the date of filing of the original petition.

This decision is in accord with the decisions of the First, Second, Third, Seventh and Eighth Circuits. See *Harney Shoes, Inc.* v. *National Fabrics & Finishing Co.*, 44 F. 2d 517 (C.A. 1); *South Suburban Safeway Lines, Inc.* v. *Carcards, Inc.*, 256 F. 2d 934 (C.A. 2); *Minkoff* v. *Steven Jrs.*, 260 F. 2d 588 (C.A. 2); *Kay* v. *Federal Rubber Co.*, 46 F. 2d 64, 65 (C.A. 3); *Bixby* v. *First National Bank of Elwood*, 250 F. 2d 713 (C.A. 7); *Commercial Credit Corp.* v. *Skutt*, 341 F. 2d 177 (C.A. 8). See 2 Collier on Bankruptcy (14th ed., 1966), Secs. 18.23, 18.26, pp. 72–73.

2. As an alternative ground for decision, the court of appeals held that the trustee was entitled to set aside the payment to petitioner under Section 70e of the Bankruptcy Act on the ground that the tax liens of the United States, as well as those of two other secured creditors of the bankrupt, were superior to petitioner's claims. Under this theory, the date of bankruptcy is not controlling, because Section 70e does not prescribe any time limits within which the trustee may avoid transactions, if the secured creditors may void them under State or federal law. See *Roscoe Moss Co.* v. *Duncan*, 336 F. 2d 670 (C.A. 9); 4 Collier on Bankruptcy (14th ed., 1964), Secs. 70.69, 70.71, p. 1547.

Petitioner's claims are as the assignee of a bank to which Casco had assigned sight drafts, secured by various of its accounts receivable. The bank failed to record the assignments. Subsequently, the United States and two other creditors recorded their claims. (Pet. A–11—A–12, A–14, A–15.) The court of appeals held

that the drafts were not negotiable instruments, and that, therefore, under Texas law, 1A, 16B Vernon's Texas Civil Statutes Annotated, Articles 260–1, 5940, the bank's failure to record the assignment made it voidable as to the government's recorded tax lien and the attachment lien of another creditor. (Pet. A–11—A–18.)

This decision is a correct reading of applicable Texas law.[2] Moreover, Article 260–1 was repealed effective June 30, 1966, and replaced by the different requirements of the Uniform Commercial Code.[3] Therefore, the issue does not have the future importance that would justify review by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

CROMBIE J. D. GARRETT,
KARL SCHMEIDLER,
Attorneys.

NOVEMBER 1967.

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[2] See *Parker Square State Bank* v. *Triangle Supply Co.*, 364 S.W. 2d 418 (Tex. Civ. App.), petition for writ of error to Texas Supreme Court denied June 5, 1963; *South Main State Bank* v. *State*, 365 S.W. 2d 946 (Tex. Civ. App.), petition for writ of error to Texas Supreme Court refused July 31, 1963; *Lawrence* v. *Delta Metals, Inc.*, 280 F. 2d 86 (C.A. 5).

[3] See § 9.302 of the Uniform Commercial Code (2 Texas General and Special Laws (1965) c. 721).

U.S. GOVERNMENT PRINTING OFFICE: 1967